

Office Politics

Civic speech shouldn't get employees fired.

BY LEWIS MALTBY

Lynne Gobbell worked for a housing-insulation company in Alabama. In the midst of the 2004 presidential campaign, she placed a John Kerry bumper sticker on the rear windshield of her car, which she then drove to work.

The owner of the company, a supporter of President George W. Bush, ordered Gobbell to remove the sticker. She objected and was fired.

Glen Hillier worked at a Maryland advertising and design company. At a political rally in West Virginia in 2004, he attempted to ask Bush challenging questions about the war in Iraq. A client who provided tickets to the event apparently was offended, and the company fired Hillier.

William Niess, a Democrat in Wisconsin, refused to make a political contribution to the party favored by his boss. As a result, he was fired in 1996.

None of these people brought suit. Absent a statute to the contrary (and no federal law protects private employees in this area), their terminations were legal.

The doctrine of employment at will allows employers to fire employees for any reason whatsoever, even reasons that are arbitrary or unfair. That general power can be restricted by statute, as Congress did with the 1964 Civil Rights Act, which bans discrimination based on race, religion, or gender. But without a specific state law, private employers can fire employees for their political speech.

Yet surely these terminations of employees exercising their rights of citizenship are wrong. Employers ought to have the right to manage their businesses as they see fit. But when they

use their economic power over people's livelihoods to control the political behavior of U.S. citizens, it threatens American democracy. The law ought to protect workers from this kind of coercion.

UNDERMINING DEMOCRACY

This isn't a radical idea. Americans cherish democracy and political speech. While Republicans and Democrats disagree strongly, even bitterly, about many issues, they agree that our country's leaders should be chosen by free elections and that all citizens have the right to express their views on political issues freely.

These civic rights are inherent in U.S. citizenship. They do not depend upon one's job situation. We are far past any notion that only the wealthy can vote, and political candidates of all parties agree that Americans should be able to participate in politics without regard to their economic status.

Employer coercion through politically based terminations threatens this civic ideal. Individuals may have the First Amendment right to express political support or opposition, but if such activities cost them their jobs, then employers will have undermined these political rights and hampered the workings of democracy.

The violation of individual rights is especially pernicious in light of most Americans' economic dependence on their employers. For mediocre wages, people will tunnel deep underground in dangerous coal mines; inhale dangerous fumes in manufacturing jobs; hang outside skyscrapers as window washers; or endure verbal, emotional, and even sexual abuse. People need their jobs, and many will sacrifice their rights as citizens to continue to provide for themselves and their families. Consequently, an employer that tries to use its financial muscle to control employees' political behavior will often succeed.

In the extreme case, employer coercion might even affect the outcome of close elections. If even 1 percent of employers muz-

zled their employees' political speech or coerced them out of participating in other political activities, it could tip the balance.

PUBLIC PROTECTION

What has government done to protect employees from political coercion? The answer varies both from state to state and from public to private sector.

Public employees have some protection from employer abuse under the Constitution. In *Pickering v. Board of Education* (1968), the Supreme Court held that, under the First Amendment, public employees cannot be fired for speaking out on matters of public concern under certain circumstances.

But this *Pickering* protection is quite limited. The matter on which the employee speaks out must be a matter of public concern, not merely a personal complaint. Even if employees clear this hurdle, they may still be unprotected if the court finds that their issue is outweighed by the government's interest in efficiency.

Several states have buttressed this meager constitutional protection by statute. Illinois, for example, provides that "no unit of local government may make or enforce any rule that in any way inhibits or prohibits any of its employees from exercising the employee's political rights." Political rights are broadly defined to include rights "to make public speeches, to campaign for or against any political candidate, to speak out on questions of public policy, to make campaign contributions, and to seek public office." This statute contains neither of the limiting hurdles for government workers found in *Pickering*. Ten states have enacted such laws.

IN THE PRIVATE SECTOR

Even more states have taken action to protect the political rights of employees in the private sector.

New Jersey's statute is typical of these efforts in that it protects against employer control over employees' voting decisions. It prohibits an employer from "threatening to inflict any loss against anyone in his employ in order to compel such employee to vote or refrain from voting for any particular candidate."

Every employer is also prohibited from enclosing political messages in pay envelopes or (within 90 days of an election) posting any sign that is "intended to influence the political opinions or actions of his employees." An employer who violates these rules has committed a misdemeanor.

Such laws, while well intended, do little to protect democracy. To begin with, they protect only the employee's actual choice in casting a ballot, which isn't the real problem. Even without legal protection, an employer can do little to force an employee to vote in a particular manner. Every jurisdiction in the United States uses a secret ballot, and the employer cannot learn from the state how an employee voted. An employer might use the threat of firing to force an employee to promise to vote in a particular manner, but once the employee steps into the voting booth that promise becomes meaningless.

The political behavior that needs protection is the behavior that an employer can observe. Examples of this include speaking

out on political issues, writing letters to the editor, and making campaign contributions. But most state statutes offer no protection in this area. Lynne Gobbell, Glen Hillier, and William Niess could not have found shelter under such a statute.

The typical statute also suffers from being solely a criminal law. Most of these types of laws provide no civil right of action. In most cases district attorneys struggling with limited staff to prosecute murderers, rapists, and burglars have declined to divert resources to terminations for political behavior.

Accordingly, these statutes are not typically enforced, leaving employees without meaningful protection. It would be better if the statutes included a civil remedy and a private right of action so that victimized employees could bring suit directly to vindicate their rights.

BETTER LAWS

A few states, such as Missouri, have enacted more effective statutes. Missouri's law prohibits employers from making "any order, rule, or regulation to prevent an employee from engaging in political activities, soliciting or receiving funds for a political purpose, participating in a political convention, or subscribing his name to any initiative, referendum, or recall petition."

The only loophole in this law concerns situations in which the employer seeks to compel an employee to participate in unwanted political behavior, rather than to prevent the employee from engaging in political behavior. For example, employees could still be forced to contribute money to a candidate or to participate in a political rally against their will, even if they would be protected in doing the same things for another candidate they genuinely supported.

Even Missouri's problem is solved by California's law, which provides that "no employer shall make, adopt, or enforce any rule, regulation, or policy controlling or directing, or tending to control or direct the political activities or affiliations of employees." Unfortunately, only four other states have comparable laws, and Virginia, Maryland, and the District are not among them.

The reality today is that America has recognized in principle that it is wrong for employers to control employees' political behavior, and it has taken action to prevent this abuse. Twenty-nine states have enacted some form of statute intended to protect political behavior from employer control.

Sadly, however, these laws do not go far enough. As we once again celebrate Labor Day, it is time to enact effective legislation to protect our democracy from being undermined by employers' economic power.

What is needed are laws that shield a broad spectrum of employee political speech (like California's statute) and that allow a private right of action for employees. Ideally, a federal law would protect all Americans, but state legislatures should at least act to protect their own residents. In the next presidential election, no one should get fired for displaying the wrong bumper sticker.

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